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OCT 18 1949
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Supreme Court of the United States

OCTOBER TERM, 1949

NO. 250

ARTHUR BINGAMAN, Administrator of the Estate of Alvin A. Bingaman, Deceased,

Appellant,

vs.

ERIC H. REHN and JOHN P. MAINELLI, Doing Business under the Name and Style of John P. Mainelli Construction Company,

Appellees.

PETITION FOR REHEARING

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Comes now the above-named appellant, and presents his petition for rehearing in this case.

I.

JURISDICTION

An appeal from the Supreme Court of Nebraska was docketed in this Court on the 11th day of August, 1949. An order dismissing such appeal for want of a substantial federal question was entered by this Court on October

10, 1949. This petition is filed within fifteen days after the order of dismissal of the appeal, as required by Rule 33.

II.

REASONS FOR PETITION FOR REHEARING

1. The order of dismissal does not definitely indicate on what ground or grounds it was determined that the federal questions involved in the appeal were not substantial. The per curiam decision does not specify the questions decided. See Vol. 62, Harvard Law Review, 496, reading as follows:

> "Given the need for summary disposal of some appeals, the ambiguity of memorandum decisions may be defended upon the ground that such vagueness is the most effective way for the Court, within the limitations imposed by the jurisdictional statute, to minimize the effect of the dispositions as pronouncements on the law. On the other hand, to whatever extent that effect may be restricted, the fact remains that the dismissals still represent adjudications. Under these circumstances, the flexibility to be gained by ambiguity must be weighed against the adverse effects of memorandum opinions in their present form. Litigants must be reassured of the fact that their cases have been conscientiously determined. The bar and the lower courts, if the latter are to be required to follow these decisions, should be given reliable indications of the questions decided. It is these competing considerations which the Court must assess in determining first, whether to modify the present form of memorandum decisions, and, second, whether to appeal to Congress for relief from the mandatory jurisdiction."

Counsel and the lower court should be given reliable indication of the questions decided, if they are required

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to follow the decision, in the present case, and in the three companion cases now pending in the state courts of Nebraska. The effect of per curiam decisions upon litigants, it has been said, is to encourage recurrent efforts to bring the issues involved before the Court. And, in any event, Arthur Bingaman, administrator, defendant in the four cases heretofore referred to, is required to utilize every defense available to protect the estate he represents, even if such defense must be asserted in this Court, after adverse decree in the state courts, if the federal questions involved in the four actions have not already been decided by this Court. Bingaman, administrator, needs some instruction, some citation, in order to determine what procedure he will be obliged to follow in the future. His position is accurately stated in Vol. 62, Harvard Law Review, 489, as follows:

> "Since such dismissals represent an adjudication on the merits, the relatively large-scale reliance on insubstantiality of the federal question to preclude Supreme Court jurisdiction over appeals creates serious problems for the practitioner and even for the Court itself in its task of judicial administration. The absence of discussion in such opinions, coupled with the fact that the problem of substantiality is only rarely considered in full opinions of the Court, makes it extremely difficult to discover by what criteria the presence of this now essential jurisdictonal requirement is determined. Moreover, the paucity of supporting citations and absence of explanatory statements in these opinions make it difficult for the bar and the lower courts to ascertain what propositions of law the Supreme Court considers settled."

2. If, as indicated in *People of the State of California vs. Lamson*, 12 Fed. Sup. 813, and *Bennett vs. Roberts*, 31 Fed. Sup. 825, the remedy for denial of civil rights by a state judiciary is not to be found in the district courts of the United States, by removal thereto of any state court action, by virtue of the provisions of Section 1443 (formerly Section 74), but by appeal to the Supreme Court of the United States, then the Supreme Court of the United States should entertain appeals of all cases in which the defendant has been denied his civil rights by state courts. The litigant should find certain haven, either in the federal district courts or in this court, and this regardless of whether or not a question of outstanding importance were involved or not. If questions of so-called minor importance are excluded from appeal to the Supreme Court, Section 1443 would have been interpreted as giving the right of removal in those cases involving matters of minor importance. There is, however, in addition to the reasons cited above in this Section 2, an additional reason why the Supreme Court of the United States should entertain appeals of the types of actions of this suit. Some federal courts have indicated that in actions where state probate courts have original, exclusive jurisdiction, as they have in this case, and in the companion cases, removal to the federal courts is not to be permitted. The Supreme Court of the United States is the only federal court in which a litigant denied his civil rights can be sure of being heard. See U. S. C. A. Title 28, Par. 71, Note 125.

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3. If lack of major importance of the questions involved were a factor in holding them insubstantial, Ap-

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pellant Bingaman calls the attention of this Court to a late opinion of this Court, *Just vs. Chambers*, 312 U. S. 383, 61 S. Ct. 687. Neither the appeal papers nor Appellant Bingaman's brief in opposition to motion to dismiss made any reference to this opinion, it had been overlooked. That case was, as this one is, *a personal injury, negligence case, in which the survival or non-survival of a cause of action for personal injuries against the personal representative of the estate of the alleged wrongdoer* was the only question considered by this Court. The laws of Florida regarding the survival of causes of action are involved in Just vs. Chambers, supra, and Rehn vs. Bingaman. It thus appears that this court has recently entertained an action similar to the present case, considering it was of sufficient importance to merit a hearing. Appellant Bingaman contends the question involved here is of major importance, because any indication by this court of its attitude will be reflected, not only in Nebraska, but in many other states.

III.

For the foregoing reasons, appellant respectfully urges that a rehearing be granted; that upon further consideration the order of October 10, 1949, dismissing the appeal be revoked, and that probable jurisdiction of the appeal be noted.

C. Dell Floyd,

Cranny & Moore,

Attorneys for Appellant-Petitioner.

I, C. Dell Floyd, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

C. Dell Floyd,

Attorney for Appellant.

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